

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LOUIS STRYKER

Claimant

VS.

CASTLEGATE INDUSTRIES, INC.

Respondent

AND

UNITED STATES FIDELITY & GUARANTY CO.

Insurance Carrier

AND

KANSAS WORKERS COMPENSATION FUND

Docket No. 165,957

ORDER

On the 22nd day of June, 1995, the application of the claimant for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge John D. Clark, dated January 26, 1995, came on for oral argument. Appeals Board Member Duncan Whittier recused himself from these proceedings and Jeff K. Cooper is serving herein as Appeals Board Member Pro Tem.

APPEARANCES

Claimant appeared by and through his attorney, Timothy A. Short, of Pittsburg, Kansas. The respondent and its insurance carrier appeared by their attorney, Stephen B. Angermayer, of Pittsburg, Kansas. There were no other appearances.

RECORD & STIPULATIONS

The record considered by the Appeals Board for purposes of this review is the same as set forth in the Award of the Administrative Law Judge, dated January 26, 1995, and the Appeals Board adopts that specification of the record as if fully set forth herein. For purposes of this appeal, the Appeals Board adopts those stipulations listed in the Award of Administrative Law Judge John D. Clark, dated January 26, 1995.

ISSUES

- (1) Nature and extent of disability, including the compensability of an alleged shoulder injury.

- (2) Failure to transfer the case from Judge Clark, as required by K.S.A. 44-523c following the claimant's request for such transfer on January 11, 1995.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant is a 38 year old individual who was injured on January 13, 1992, while doing repetitive work on bridge water-frames and aligning skid tops with the palms of his hands. While using the palms of his hands to align the skid tops he experienced numbness in his right arm and three fingers on the right side of his hand.

Claimant was initially referred to Dr. Koehn, company doctor, who then referred him to Dr. Saad Al-Shathir, a psychiatrist, who performed a nerve conduction test which was found to be normal. Dr. David L. Black, an orthopedic surgeon from Joplin, Missouri, later ordered a second nerve conduction test which revealed mild ulnar neuropathy and cubital tunnel syndrome. Claimant was provided treatment in the form of conservative care initially, and later received operative care on May 28, 1992. Dr. Black does not remember claimant making any complaints of shoulder pain prior to August 13, 1992; however, Dr. Black acknowledges that the physical therapy records did reflect complaints of shoulder pain during therapy. Dr. Black examined the claimant's shoulder and felt his range of motion was normal. Dr. Black acknowledged that he did not do a detailed examination of the shoulder, nor did he take measurements of claimant's range of motion. He further acknowledges that physical therapy records reflect a worsening of the range of motion of internal rotation, which can result from rotator cuff tendinitis or bursitis of the shoulder. Dr. Black's rating of ten percent (10%) did not include any rating for permanent partial impairment to the shoulder. Dr. Black released claimant to return to work on August 10, 1992.

Claimant returned to work on August 10, 1992, worked one day and was terminated from his position with the respondent.

Claimant was also examined by Dr. John Wertzberger at the request of his attorney on June 10, 1993. Dr. Wertzberger was provided the history of the injury occurring on January 13, 1992, and surgery on May 28, 1992, with casting for two weeks, work hardening and physical therapy thereafter. Dr. Wertzberger noted that part of the work hardening included overhead nautilus and elicited a history of sudden pain in the right shoulder during a lifting maneuver on the overhead nautilus. At the time of Dr. Wertzberger's examination the claimant had complaints of pain in the right elbow and shoulder and experienced a loud pop in the shoulder with elevation of the arm. Dr. Wertzberger found a slight loss of movement in internal rotation of the right shoulder, as well as tenderness at the posterior portion of the shoulder. Dr. Wertzberger found an audible pop or click in the shoulder on full elevation which was not present in the left shoulder. Dr. Wertzberger is of the opinion that the claimant had either a strain and/or bursitis or impingement of the right shoulder which developed during the work hardening process. Dr. Wertzberger testified that the elbow injury was directly related to the work, and that the shoulder problems were caused by the treatment and rehabilitation for the elbow. Dr. Wertzberger found that the claimant had an eleven percent (11%) impairment of the upper extremity related to the shoulder, and an eighteen percent (18%) impairment related to the elbow, which combined for a twenty-seven percent (27%) upper extremity impairment rating, or a sixteen percent (16%) impairment to the body as a whole, relying on the AMA Guides to the Evaluation of Permanent Impairment, Third Edition (Revised).

Dr. Wertzberger imposed restrictions against overhead and shoulder-high work due to the derangement of claimant's shoulder.

The deposition of Frank Eitemiller, physical therapist, who performed the work hardening therapy on the claimant was also taken. Mr. Eitemiller confirmed that during the physical therapy the claimant had consistent complaints of right shoulder pain, and that the physical therapist visually confirmed that the claimant was having trouble with particular machines, and as a result some functions on the machines were eliminated. Mr. Eitemiller acknowledged that the claimant had limitations upon completion of the work hardening, and that he had weakness in the involved extremity.

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in this case and has the responsibility of making its own determination. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212 rev. denied 249 Kan. 778, (1991).

Based on the above, the Appeals Board finds that it is more probably true than not the claimant suffered a work-related injury to the right shoulder and, therefore, has a general body disability. The findings of Dr. Wertzberger are consistent with the complaints of the claimant, complaints made to Dr. Black, and complaints made during physical therapy. The Appeals Board, therefore, finds that the claimant is entitled to a permanent partial whole body functional disability of sixteen percent (16%).

Claimant is no longer employed by the respondent, and the only evidence presented in the record as to work disability is that of Karen Sherwood, who opined that the claimant had lost fifty percent (50%) of his ability to perform work in the open labor market, and had further suffered between forty-two to fifty-five percent (42-55%) loss of ability to earn comparable wages. The Appeals Board finds the claimant's loss of ability to perform work in the open labor market and loss of ability to earn a comparable wage should be given equal weight. Therefore, based on Karen Sherwood's testimony, the Appeals Board finds that the claimant is entitled to a forty-nine percent (49%) work disability. This analysis is in accordance with the decision in Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990).

The Workers Compensation Appeals Board on a review of any act, finding, award, decision, ruling or modification of findings or awards of the Administrative Law Judge, shall have the authority to grant or refuse compensation, or to increase or diminish any award of compensation, or to remand any matter to the Administrative Law Judge for further proceedings. K.S.A. 1991 Supp. 44-551(b)(1).

With regard to whether the transfer from Administrative Law Judge John D. Clark was proper, this issue has been ruled on previously and without belaboring the point, the transfer does not become effective until the Administrative Law Judge receives an Order of Transfer from the Director.

AWARD

WHEREFORE, it is finding, decision and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark is hereby modified and an award of compensation is hereby made in favor of the claimant, Louis Stryker, and against respondent, Castlegate Industries, Inc., and its insurance carrier, United States Fidelity & Guaranty Company, based on an average weekly wage of \$392.90, for an injury occurring January 13, 1992, for 24.43 weeks of temporary total compensation at the rate of \$261.95, for a total amount of \$6,399.44, and 390.57 weeks of compensation at the rate of \$128.36 per week, for 49% permanent partial impairment to the body as a whole, in the sum of \$50,133.57 for a total award of \$56,533.01.

As of December 10, 1995, there is due and owing to the claimant, 24.43 weeks of compensation at \$261.95 per week in the sum of \$6,399.44, and 179.28 weeks of permanent partial compensation at the rate of \$128.36 per week in the sum of \$28,012.38, making a total of \$29,411.82, all of which is past due and owing and ordered to be paid in one lump sum, less compensation heretofore paid. The remaining \$27,121.19 is to be paid at \$128.36 per week for 211.29 weeks, until fully paid or further order of the Director.

Pursuant to K.S.A. 44-536, the claimant's contract of employment with his counsel is hereby approved.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed against the respondent to be paid direct as follows:

Delmont Reporting Service	
Transcript of Stipulations	\$ 82.95
Hostetler & Associates, Inc.	
Deposition of John Wertzberger, M.D.	\$298.80
MBF Reporting Service	
Deposition of Frank Eitemiller	\$179.55
Patricia K. Smith, CSR	
Deposition of Louis Stryker	\$333.90
Deposition of Karen Sherwood	\$145.90
Deposition of Alan Wheeler	\$241.55
Deposition of Lisa Cussimano	\$ 25.25
Deposition of Gregory Cussimano	\$ 60.75
Deposition of Doug Lindahl	\$110.15
Deposition of David Black, M.D.	\$ 96.95
Total	\$1,014.45

IT IS SO ORDERED.

Dated this ____ day of December 1995.

BOARD MEMBER PRO TEM

BOARD MEMBER

BOARD MEMBER

c: Timothy A. Short, Pittsburg, Kansas
Stephen B. Angermayer, Pittsburg, Kansas
John D. Clark, Administrative Law Judge
Philip S. Harness, Director

LOUIS STRYKER

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